No. 93-1536

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In The

Supreme Court of the United States

October Term, 1993

EJAY TRAVEL, INC., NANCY DEMBOWSKI, VIRGINIA L. GRANDY, T. SEAN CRUMLISH, ROBERT ALLEN, REGENT INC. OF 15TH STREET d/b/a GIORGIO BRUTINI, LEGXPRESS, INC., PENNSYLVANIA SQUARE CORP., ANTHONY VINCIGUERRA, JOHN M. CORCORAN, SUNSHINE PERSONNEL, INC., ROYAL BANK OF PENNSYLVANIA, ROBERT J. ATLEE, C.W.D. ENTERPRISES, INC., d/b/a CHRIS' CAFE AND BAR, THE HAPPY ROOSTER, INC. and LINPRO PHILADELPHIA CENTER CITY OFFICE I, LTD.,

Petitioners,

vs.

ALGEMEEN BURGERLIJK PENSIOENFONDS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KATHLEEN M. COMFREY
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

STEPHEN A. COZEN
Counsel of Record
ROBERT W. HAYES
E. J. BORRACK
COZEN AND O'CONNOR
The Atrium, Third Floor
1900 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-2000

Attorneys for Respondent

4996
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

29 pp

QUESTIONS PRESENTED

Whether this Court should grant certiorari over an appeal raising fact-bound issues as to the interpretation of a statutory provision it clearly construed on several occasions, including in each of the last two terms.

Whether this Court should grant certiorari where the Third Circuit Court of Appeals simply applied the correct legal standard, as enunciated by the clear terms of the statute and recent decisions of this Court, and as uniformly recognized by other courts of appeals, to the facts as found by the district court after an extensive review of the record, to hold that respondent Algemeen Burgerlijk Pensioenfonds is immune from suit pursuant to the Foreign Sovereign Immunities Act.

Whether this Court should grant certiorari where petitioners essentially request that the Supreme Court review the district court's findings of fact.

LIST OF PARTIES

The parties to this proceeding include petitioners, as listed in the Petition for a Writ of Certiorari, and respondent, Algemeen Burgerlijk Pensioenfonds ("ABP"), the General Civil Pension Fund of the Netherlands.[1]

1. In compliance with Supreme Court Rule 29.1, the following subsidiaries of ABP are wholly-owned: Galgenwaard B.V., N.I.H. B.V., World Trade Center Amsterdam I B.V., Abp Vastgoed Holding B.V. and Beheersmaatschappij WTC.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Denying the Writ	10
I. This Court has already conclusively interpreted the commercial activity exception.	11
II. The Third Circuit's decision is not inconsistent with decisions of other circuits.	12
III. The Third Circuit correctly interpreted the third clause of the FSIA and its conclusion is consistent with the plain language of the statute, with recent Supreme Court precedent and with decisions of other circuits.	14
IV. This Court should not grant certiorari to review the district court's factual findings.	18
V. Because the district court's findings were not clearly erroneous, the Third Circuit was correct to limit its review to those facts developed below.	20

Contents

Page

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Antares Aircraft v. Fed. Republic of Nigeria, 999 F.2d 33 (2d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 878 (1994) 12, 13

Arriba Ltd. v. Petroleros Mexicanos, 962 F.2d 528 (5th Cir. 1992) 16

Bass v. Attardi, 868 F.2d 45 (3d Cir. 1989) 20

Clark v. K-Mart Corp., 979 F.2d 965 (3d Cir. 1992) 20

Federal Insurance Co. v. Richard I. Rubin & Co., Inc., Eastern District of Pennsylvania, Civil Action No. 92-4177 ..... 5, 7

Federal Insurance Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993) 7, 21

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) 8, 16, 17

Foremost-McKesson v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 16

General Elec. Capital Corp. v. Grossman, 991 F.2d 1376 (8th Cir. 1993) 12, 13

Contents

Page

Gibbons v. Vdaras na Gaeltachta, 549 F. Supp. 1094 (S.D.N.Y. 1982) 12

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 18

Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987) 16

Hester Int'l Corp. v. Fed. Republic of Nigeria, 879 F.2d 170 (5th Cir. 1989) 16

In re Capital Cities, 913 F.2d 89 (3d Cir. 1990) 20

Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) 16

Republic of Argentina v. Weltover, Inc., __ U.S. __, 112 S. Ct. 2160 (1992) 11, 15

Salve Regina College v. Russell, 499 U.S. 225 (1991) 18

Saudi Arabia v. Nelson, __ U.S. __, 113 S. Ct. 1471 (1993) 8, 11, 15

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1812 (1993) 12, 13

Texas Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) 12, 13, 14

Contents

Page

Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534 (11th Cir. 1993) 12, 13

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1330 3

28 U.S.C. § 1601-1611 1

28 U.S.C. § 1603 3

28 U.S.C. § 1605(a)(2) 4, 5

28 U.S.C. § 1605(a)(2)(5) 4

Rules Cited:

Supreme Court Rule 10 ..... 10, 14

Supreme Court Rule 10.1(a) 12

Other Authority Cited:

H. Rep. No. 1487, 94th Cong. 2d Sess. 29-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6628-29 17

STATEMENT OF JURISDICTION

On December 28, 1993, the Third Circuit Court of Appeals reversed and remanded the order of the United States District Court for the Eastern District of Pennsylvania in these actions and found, *inter alia*, that respondent ABP was immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601-1611 ("FSIA"). Petitioners seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

These consolidated actions represent a few of the over forty actions arising out of a fire that took place, on February 23, 1991, at the One Meridian Plaza Building (the "Building"), in Philadelphia, Pennsylvania.[2] In each of the actions arising out of the fire, the plaintiffs sought to recover for loss of life, personal injuries, property damage or economic losses that they claim resulted from the fire.

The first of the pending actions was commenced on or about March 1, 1991, virtually before the smoke cleared from the Building, in the Court of Common Pleas of Philadelphia County. Petitioners commenced several additional actions, seeking to recover, individually and on behalf of classes of entities they sought to represent,[3] for purported property damage and economic loss.

In support of their claims for relief, petitioners essentially

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2. All but these consolidated actions and one other action have since been settled.

3. On July 16, 1993, petitioners' Motion for Class Certification was denied.

alleged that the fire started through the spontaneous combustion of linseed oil which was negligently stored in the offices of one of the Building tenants. They asserted that it spread beyond the area of origin as a result of a combination of factors, including the failure of certain aspects of the Building's fire detection, alarm and suppression and other emergency equipment.

Petitioners sought to hold numerous parties responsible for the origin and spread of the fire, including E/R Associates, the owner of the Building, and Richard I. Rubin & Co., Inc., which was responsible for managing the Building. In this respect, petitioners specifically alleged in their Complaint that E/R Associates was a general partnership, consisting of Pan American Office Investments, Inc., The Equitable Life Assurance Society of the United States and USA One Associates, which was itself a partnership consisting of two Dutch corporations, USA One BV and USA Two BV.

Petitioners also named ABP as a defendant in these actions on the tenuous basis that it owned all of the stock of USA Holding BV, another Dutch corporation, which owns all of the stock of USA One BV and USA Two BV. Petitioners did not, and could not truthfully, allege that ABP owned the Building or was a partner in E/R Associates. Instead, they asserted, as they have throughout these cases and continue to assert in their Petition for a Writ of Certiorari, that ABP negotiated to acquire an interest in E/R Associates, created USA One BV and USA Two BV to make this investment and, thereafter, made crucial decisions about the operation of the Building.

ABP is the General Civil Pension Fund of the Dutch government, responsible for providing, *inter alia*, retirement and other benefits to those who fought in the resistance during World War II and to the civil servants of the Dutch government. It was created by an act of the Dutch Parliament as an agency of the Dutch

government, and there are no shares of stock or other certificates of ownership existing or contemplated in connection with ABP. It is governed by a Board of Trustees appointed by Royal Decree and maintains its principal place of business in the Netherlands.

Accordingly, ABP squarely meets the definition of an agency or instrumentality of the Dutch government, thereby qualifying as a foreign sovereign under the FSIA. 28 U.S.C. § 1603. As such, beginning on April 3, 1991, ABP removed each of the actions petitioners commenced to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. §§ 1330 and 1441(d) (which respectively confer jurisdiction in the district courts over any actions commenced against a foreign sovereign and permit the removal of any such actions).[4]

Thereafter, several actions arising out of the fire were commenced directly in federal court on the basis of the court's subject matter jurisdiction over claims against ABP. Subsequent actions filed against ABP in state court were removed.

After the district court consolidated the instant actions, petitioners filed a Consolidated First Amended Class Action Complaint (the "First Complaint").[5] The defendants in these actions moved to dismiss the First Complaint on numerous substantive grounds. At the same time, ABP moved to dismiss on the grounds that as an agency or instrumentality of the Dutch government, it is immune from suit under the FSIA.

Petitioners responded to this Motion to Dismiss by asserting

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4. Defendants USA One BV and USA Two BV joined in these removals. Although these defendants are agencies or instrumentalities of a foreign sovereign, they have never contested jurisdiction or asserted an immunity defense in that this action is based upon their purported commercial activity.

5. On August 26, 1993, petitioners again amended their Complaint.

that both the commercial activity and non-commercial tort exceptions to the immunity created under the FSIA, 28 U.S.C. § 1605(a)(2) and (5), applied to ABP. Section 1605(a)(2) provides that:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

In support of this position, petitioners introduced deposition transcripts and documents which they contended demonstrate that USA Holding BV, USA One BV and USA Two BV are "paper subsidiaries" through which ABP controlled the operation and management of the Building. Based on these factual assertions, petitioners argued that ABP had waived its sovereign immunity.

ABP disputed these assertions contending that, while it did finance the acquisition of an interest in E/R Associates by USA One Associates, it did not acquire an interest in the Building or control the Building's operations. ABP created USA Holding BV, which formed USA One BV and USA Two BV. USA One Associates then acquired a sixty five percent interest in the Building in part with the proceeds of a loan from ABP.

While the aforesaid Motion to Dismiss was pending, ABP and USA Holding BV moved to dismiss the claims asserted against them in another action, *Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, Eastern District of Pennsylvania, Civil Action No. 92-4177, on the basis of their immunity from suit. Plaintiffs in the *Federal Insurance* case also opposed ABP's and USA Holding BV's Motion to Dismiss by arguing that ABP controlled the operation of the Building and submitted documents in support of such contention. The *Federal Insurance* plaintiffs asserted that the purported conduct constituted commercial activity sufficient to waive ABP's immunity from suit under the FSIA.

The district court decided the Motion to Dismiss in *Federal Insurance* first, denying ABP's and USA Holding BV's Motion. With the record developed in both the instant actions and in the *Federal Insurance* action before it, the district court initially held that ABP and USA Holding BV are agencies or instrumentalities of a foreign sovereign (Petitioners' Appendix ("Pet. App.") 126a). Furthermore, it expressly rejected the argument that ABP exercised undue control over USA Holding BV or that USA Holding BV exercised undue control over USA One BV and USA Two BV and refused to conclude that ABP or USA Holding BV actually directed the operation of the Building (Pet. App. 133a-134a). Nevertheless, it concluded that both of these foreign sovereigns waived their immunity from suit.

First, the district court held that USA Holding BV had waived its immunity from suit, pursuant to the first clause of the commercial activity exception, 28 U.S.C. § 1605(a)(2), simply by creating USA One BV and USA Two BV. The district court concluded that this constituted commercial activity in the United States, as the purpose of creating these corporations was to invest in real estate located here. The court reasoned that it was proper to hold USA Holding BV liable for the actions of USA One BV and USA Two BV on such a basis.

The court next found jurisdiction over ABP under the third clause of the FSIA's commercial activity exception as a result of ABP's extension of the arms-length loan to USA One Associates to finance its acquisition of an interest in the Building even though the Court recognized that the loan was executed pursuant to the laws of the Netherlands, and payments were made to ABP in the Netherlands in U.S. dollars (Pet. App. 122a, 132a).[6] The Court held that ABP's activity had a direct effect in the United States because USA One Associates' acquisition of an interest in the Building was an "immediate consequence" of the loan transaction (Pet. App. 132a-133a).

Alternatively, the court held that it would work a fraud or injustice to recognize the separate independent status of ABP and its wholly-owned subsidiary USA Holding BV, even though it affirmatively found that there was no principal-agency relationship between these entities and, further, that ABP's financing of the acquisition of the Building did not warrant a conclusion that the transaction was beyond the scope of normal corporate activities between parent and subsidiary (Pet. App. 133a-134a). The district court's decision was based solely upon the court's conclusion that permitting ABP to establish USA Holding BV without being held liable for the purported acts of USA Holding BV's subsidiaries would allow ABP to "circumvent its obligations for violations of the United States laws, while nevertheless reaping the benefits of investing in United States property." (Pet. App. 134a).

Thereafter, on April 16, 1993, the district court entered an

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6. There is no record evidence or factual finding below that ABP, in order to keep the payment of this loan current, attempted to implement policies in the Building or insisted that the Building's budget be spent in a certain way. Nor does the record below contain evidence that ABP was an owner or manager of the Building or that ABP was involved in the formulation or implementation of any policies at the Building.

Order and Memorandum Opinion in which it, *inter alia*, denied ABP's Motion to Dismiss petitioners' Complaint on jurisdictional grounds, incorporating by reference its Order and Memorandum Opinion in the *Federal Insurance* action (Pet. App. 117a). As it found that the commercial activity exception applied, the district court did not address petitioners' contention that the non-commercial tort exception also applied.

ABP and USA Holding BV appealed these decisions to the Third Circuit.[7] On appeal, ABP (and USA Holding BV) argued that based upon its findings of fact, the district court erred as a matter of law in its interpretation of the FSIA. In response, petitioners, recognizing that they could not prevail based upon the record established in the district court, argued that the Third Circuit should reverse the findings of fact below. Specifically, they argued that there was substantial evidence that ABP controlled the operation of the Building after USA One Associates acquired an interest therein and that the district court erred in rejecting their factual assertions.

On December 28, 1993, the Third Circuit Court of Appeals reversed. *See Federal Insurance Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3d Cir. 1993) (*See* Pet. App. 1a-47a). The Third Circuit first accepted the district court's findings of fact because they were not clearly erroneous. It then held that the facts found by the district court, as a matter of law, could not justify the conclusion that either ABP or USA Holding BV had engaged in commercial activity sufficient to warrant a finding that they had waived their sovereign immunity.

The Court of Appeals first applied the FSIA to USA Holding BV and then relied upon its conclusions as to USA Holding BV in

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7. The Third Circuit consolidated these appeals with the appeal in *Holcombe v. Richard I. Rubin & Co., Inc.*, another action arising out of the fire.

its determination of ABP's immunity. It found that the district court erred in attributing the commercial activities in the United States of USA One BV, USA Two BV and USA One Associates with respect to managing and operating the Building, to USA Holding BV. Specifically relying upon this Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), and the unanimous authority of the Circuit Courts of Appeals applying *Bancec*, the Third Circuit held that the acts of separate juridical entities should not be attributed to related foreign entities unless one entity has been so extensively controlled by its owner that a relationship of principal and agent has been created, or to recognize their separate existence would work a fraud or injustice (Pet. App. 37a-38a). The Third Circuit concluded that, given the district court's affirmative factual finding that USA Holding BV did not exercise undue control over USA One BV and USA Two BV, and its failure to articulate any justification for the conclusion that it would work a fraud or injustice to recognize the separate corporate existence of USA One BV or USA Two BV, there was no basis for the district court's legal conclusion that the separate juridical status of these entities should be disregarded (Pet. App. 38a).

Moreover, relying upon this Court's unambiguous decision in *Saudi Arabia v. Nelson*, __ U.S. __, 113 S. Ct. 1471 (1993), the Third Circuit held that the single act of creating USA One BV and USA Two BV did not serve to waive USA Holding BV's immunity from suit under the first clause of the commercial activity exception (Pet. App. 38a). The Third Circuit held that the language of the statute and the *Nelson* decision clearly mandate that for the first clause of the commercial activity exception to apply in a specific action, not only must the foreign sovereign engage in commercial activity, but the action must be based upon that commercial activity. It concluded that petitioners could not satisfy this test because their Complaint was based upon the purported negligent operation of the Building and not the formation of USA One BV and USA Two BV.

In turn, with respect to ABP, the Court of Appeals rejected the district court's conclusion that it would work a fraud or injustice to recognize the separate juridical status of ABP, stating that:

> We must reject the District Court's second theory of jurisdiction [piercing the corporate veil from USA Holding BV to ABP] over ABP because we have already determined that on this record the Court erred as a matter of law in concluding that USA Holding [BV] relinquished its sovereign immunity.

(Pet. App. 42a).

The Third Circuit finally held that ABP's loan to USA One Associates could not, as a matter of law, be the basis for finding a waiver of ABP's sovereign immunity because there was no substantive nexus between the claims petitioners asserted with respect to the fire and the loan (Pet. App. 45a-46a). The Third Circuit held that the mere fact that the loan enabled USA One Associates to acquire an interest in the Building was an insufficient nexus between the claims asserted by petitioners and ABP's commercial activity.

The Third Circuit remanded to the district court for proceedings consistent with its opinion. As the district court had not ruled upon the applicability of the non-commercial tort exception, the Third Circuit held that it would be permitted to consider this issue on remand.

Once the matter was remanded, ABP and USA Holding BV renewed their request to dismiss the claims against them. The parties have briefed the applicability of the non-commercial tort exception and the matter is pending for decision by the district court.

Meanwhile, petitioners seek a petition for a writ of certiorari to review the Third Circuit's application of the third clause of the commercial activity exception to ABP. In their Petition, petitioners argue at length that ABP controlled the operation of the Building in order to maximize profits and thereby insure repayment of the loan. They claim that their action is accordingly based upon acts (directing the operation of the Building) in connection with a commercial activity (the loan) and, as such, the third clause of the commercial activity exception applies.

However, in order for this Court to accept petitioners' argument, it would have to reverse the district court's factual finding that ABP did not control the operation of the Building. Petitioners accordingly seek certiorari essentially to have this Court review such factual findings. This is not the type of issue appropriate for Supreme Court review.

REASONS FOR DENYING THE WRIT

Pursuant to Supreme Court Rule 10, a petition for a writ of certiorari will be granted only where there are "special and important" reasons. No such reasons exist in the instant matter.

Petitioners seek to convince the Supreme Court to revisit a well-settled area of law, which it interpreted twice in the last two terms. The language of the FSIA and this Court's recent decisions provide clear and unambiguous guidance as to how this statute should be applied. Indeed, there has been no disagreement among the circuits as to the interpretation of the commercial activity exception since the Court's most recent decisions.

This case does not raise issues of far-reaching significance or importance that warrant review by this Court because the Third Circuit opinion turns on the unique factual circumstances of the

case and the application of the court's statement of the law to those specific facts. The Third Circuit correctly applied the appropriate standard of review in examining this issue and in adopting the district court's findings of fact.

I.

THIS COURT HAS ALREADY CONCLUSIVELY INTERPRETED THE COMMERCIAL ACTIVITY EXCEPTION.

Given the number of cases and important issues facing this Court, a relevant factor in determining whether to grant certiorari should be the extent to which the Court has previously addressed the issues presented for review. In the instant proceedings, this Court has recently, and clearly, decided each of the issues petitioners seek to have reviewed.

The Court decided *Nelson* just last term, and in that case extensively analyzed the commercial activity exception to the FSIA and delineated the elements necessary to establish a waiver under the first clause of this section. While the *Nelson* Court did not address the second and third clauses of the commercial activity exception and did note that there may be a more tenuous nexus between the claims asserted and the commercial activity under those clauses, the extent of the nexus required under these clauses of the FSIA was addressed in *Republic of Argentina v. Weltover, Inc.*, __U.S.__, 112 S. Ct. 2160 (1992).

Weltover was a unanimous decision and eight Justices joined in the *Nelson* judgment. Together, these decisions provide clear guidance as to the interpretation of the commercial activity exception to the FSIA and leave no issues, relevant to this case, unresolved. This Court has clearly spoken on these issues, and it is

the duty of Circuit Courts of Appeals and District Courts to apply these holdings to the individual fact patterns with which they are presented. This is precisely what the Third Circuit did in the instant action.

Moreover, to the extent petitioners raise issues as to whether the Third Circuit properly held that ABP's separate juridical status should be respected, the Court addressed these issues in *Bancec.* Petitioners have not offered any reason for the Court to revisit this decision.

II.

THE THIRD CIRCUIT'S DECISION IS NOT INCONSISTENT WITH DECISIONS OF OTHER CIRCUITS.

Petitioners argue that this Court should issue a writ of certiorari because the Third Circuit's decision is allegedly inconsistent with decisions of other Circuit Courts of Appeal in *Vermeulen v. Renault, U.S.A., Inc.,* 985 F.2d 1534 (11th Cir. 1993); *Antares Aircraft v. Fed. Republic of Nigeria,* 999 F.2d 33 (2d Cir. 1993), *cert. denied,* __ U.S. __, 114 S. Ct. 878 (1994); *General Elec. Capital Corp. v. Grossman,* 991 F.2d 1376 (8th Cir. 1993); *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699 (9th Cir. 1992), *cert. denied,* __ U.S. __, 113 S. Ct. 1812 (1993); and *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria,* 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982).[8] In fact, the

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8. Petitioners also cite *Gibbons v. Udaras na Gaeltachta,* 549 F. Supp. 1094 (S.D.N.Y. 1982), in support of this assertion. However, *Gibbons* is a district court case. This Court does not grant certiorari for a conflict between a district court decision and a circuit court decision. *See* Supreme Court Rule 10.1(a).

courts in each of these cases interpreted the third clause of the commercial activity exception in the same manner as the Third Circuit.

In each instance, the courts recognized that there must be some substantive nexus between the claims asserted and the commercial activity in which the foreign sovereign is alleged to have engaged. The reason the courts found a waiver in those actions was that, under the facts presented, there was such a nexus. Indeed, in many of these cases, the plaintiff's claims were based upon the very commercial activity through which the foreign sovereign had waived its immunity, and the actual issue presented for appeal was whether there was a direct effect in the United States from this commercial activity.

For instance, in *Vermeulen,* the plaintiff was the owner of a Renault automobile and brought claims alleging the negligent design and manufacture of the 1982 LeCar passenger restraint system. *Vermeulen,* 985 at 1543. The Eleventh Circuit applied the third clause of the commercial activity exception to determine whether plaintiff's claims were acts performed in connection with a commercial activity of the defendant outside the United States and concluded that the design and manufacture of the LeCar "unquestionably were acts connected to a commercial activity . . . outside the United States." *Id.* at 1544. The *Vermeulen* court applied the same legal standard as did the Third Circuit, but a very different set of facts led it to reach an opposite conclusion.

Similarly, *Texas Trading, General Electric, Siderman* and *Antares Aircraft* are not applicable because each focused on the interpretation of the "direct effect" language of the third clause of the commercial activity exception. None of these cases contain an in-depth analysis as to whether the claims being sued upon were *based upon* acts performed in connection with commercial activity. However, the *Texas Trading* court addressed the "based

upon" language of the third clause of the commercial activity exception in a footnote. The court found that Nigeria's cement contracts and letters of credit qualified as commercial activity. *Texas Trading*, 647 F.2d at 310. With respect to the actions upon which the suit was based, namely the anticipatory repudiation of those cement contracts and letters of credit, the court had "little doubt" that these actions were based upon acts performed in connection with the defendants' commercial activity. *Id.* at 311 n.30. The factual scenario in *Texas Trading* offered the Second Circuit a clear causal link, but the Third Circuit could not have reached a similar conclusion given the findings of fact in this case.

A mere difference in result does not establish a conflict among the circuits under Supreme Court Rule 10. To satisfy this requirement, the Circuit Courts of Appeal must actually disagree as to the interpretation of what a statute means or what the substantive rule of law should be. There is no such divergence of opinion here.

III.

THE THIRD CIRCUIT CORRECTLY INTERPRETED THE THIRD CLAUSE OF THE FSIA AND ITS CONCLUSION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE, WITH RECENT SUPREME COURT PRECEDENT AND WITH DECISIONS OF OTHER CIRCUITS.

The Third Circuit correctly held that the district court erred in finding that it had subject matter jurisdiction over ABP under the third clause of the commercial activity exception because the claims alleged by petitioners were not "'based upon' acts performed 'in connection with' ABP's commercial activity." (Pet. App. 44a). The express language of the commercial activity exception demonstrates that the Third Circuit correctly held that

there must be a substantive connection between the claims asserted in the litigation and the commercial activity in question.

The clause in question specifically states that a foreign sovereign's immunity shall be waived in any case "in which the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." While the litigation does not have to be based upon the commercial activity itself, it must be based upon an act undertaken in connection with this commercial activity. Moreover, this Court adopted this interpretation of the statute in *Weltover.*

In this respect, there is no basis for petitioners' contention that the Third Circuit applied the more stringent "based upon" standard rather than merely determining whether the act sued upon was performed "in connection with" a commercial activity. To the contrary, the Third Circuit accurately noted that this Court "did not describe the extent of a substantive connection required under the second and third clauses of the commercial activity exception in *Nelson* because the case raised an issue only under the first clause of the exception." (Pet. App. 44a-45a). It specifically addressed the *Nelson* dictum and acknowledged that the "in connection with" language of the third clause might allow for a more tenuous causal link between the claims alleged and the commercial activities than that required by the first clause (Pet. App. 44a). However, as the Third Circuit noted, neither *Nelson* nor *Weltover* "stand for the proposition that jurisdiction lies under the third clause of the FSIA commercial activity exception if the foreign state undertakes commercial activity outside the United States when the cause of action is not causally linked to the commercial activity." (Pet. App. 45a).

The Third Circuit also correctly concluded that there was no causal link, even under the more liberal standard of the third clause

of the commercial activity exception, between petitioners' claims and ABP's commercial activities. The only commercial activity that the district court found that ABP had engaged in was making the loan to USA One Associates and forming USA Holding BV. No one could reasonably contend that the alleged negligent operation of the Building is *based upon* any act *taken in connection* with those lending activities.

Similarly, the Third Circuit's conclusion that the acts of USA Holding BV, USA One BV and USA Two BV may not be attributed to ABP is consistent with the *Bancec* decision. *Bancec* clearly established that the separate juridical status of foreign sovereigns should be generally respected. Every Circuit Court of Appeals to have considered the issue has read *Bancec* as prohibiting the attribution of the activities of one agency or instrumentality of a foreign sovereign to another agency or instrumentality for purposes of determining whether it has engaged in commercial activity within the United States. *See Arriba Ltd. v. Petroleros Mexicanos,* 962 F.2d 528, 533-34 (5th Cir. 1992); *Foremost-McKesson v. Islamic Republic of Iran,* 905 F.2d 438, 447 (D.C. Cir. 1990); *Hester Int'l Corp. v. Fed. Republic of Nigeria,* 879 F.2d 170, 176 (5th Cir. 1989); *Hercaire Int'l, Inc. v. Argentina,* 821 F.2d 559, 565 (11th Cir. 1987); *Letelier v. Republic of Chile,* 748 F.2d 790, 795 (2d Cir. 1984), *cert. denied,* 471 U.S. 1125 (1985).

It is accordingly the exceptional case in which the acts of one foreign sovereign may be attributed to the other. *Bancec* established that this may occur only where: (1) the entity is so extensively controlled by its owner that a principal/agent relationship is created; or (2) to recognize the corporate form would work "fraud and injustice." 462 U.S. at 629. Once again, the factual findings of the district court preclude the conclusion that either exception applies here.

As noted previously, the district court found no evidence that

ABP exercised undue control over USA Holding BV, USA One BV or USA Two BV. Given this finding of fact, there is no basis to hold that a principal/agent relationship existed between ABP and any of these entities.

Petitioners' complaint that the Third Circuit erred in focusing only upon ABP's relationship to USA Holding BV is without basis. The record precludes a finding that ABP controlled any of these entities. Moreover, USA One BV and USA Two BV are not even ABP's subsidiaries. As such, it was proper for the Third Circuit to conclude that it was not necessary to address this issue with respect to ABP because the court had already found that there was no jurisdiction over USA Holding BV, the parent of USA One BV and USA Two BV.

The district court failed to find any facts to demonstrate that it would work a fraud or injustice to recognize the separate juridical status of ABP. Indeed, the district court's conclusion was inconsistent with *Bancec's* admonition that the independent status of foreign sovereigns must be respected. It was also inconsistent with the statement in the legislative history of the FSIA that:

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.

H. Rep. No. 1487, 94th Cong. 2d Sess. 29-30 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6628-29.

IV.

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE DISTRICT COURT'S FACTUAL FINDINGS.

Petitioners' real complaint is with the district court because it found that the commercial activity in which ABP engaged was the loan transaction as opposed to the ownership, operation and/or management of the Building.[9] Petitioners' entire argument that their claims arise out of acts undertaken in connection with ABP's commercial activity and that ABP exercised undue control over USA Holding BV, USA One BV and USA Two BV rests upon their assertion that ABP directed the manner in which the Building should be operated.

The fundamental flaw with petitioners' attempt to obtain a writ of certiorari with respect to these issues is that this Court does not, and should not, accept an appeal simply to review district court findings of fact. Courts of Appeals should devote their primary attention to legal issues, with the record having been constructed below and settled for purposes of the appeal. *Salve Regina College v. Russell,* 499 U.S. 225, 232 (1991). This principle is even more appropriate with respect to this Court. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (Court reluctant to examine record where both courts below agreed on facts). Moreover, findings of fact are subject to a clearly erroneous standard of review and, thus, it is the rare instance in which they will be reversed. This Court's precious resources should not be wasted

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9. Petitioners devote a substantial portion of their Statement of the Case to detailing ABP's involvement in negotiations leading up to USA One Associates' acquisition of an interest in E/R Associates, the owner of the Building. *See, e.g.*, Petition for a Writ of Certiorari at 6-8. The district court did not accept these alleged preacquisition activities as a basis for any of petitioners' direct damage claims.

upon a review of issues in which it is likely to have so little impact.

While this Court should not even consider petitioners' factual arguments, it is noted that these arguments are completely without basis. This is illustrated by the fact that petitioners' Statement of the Case contains no record citations whatsoever. In fact, petitioners' entire Statement of the Case consists of either statements that find no support in the record, distortions of the testimony of record or misleading or incomplete recitations of the evidence.

For example, on the issue of whether ABP unduly controlled USA Holding BV, USA One BV and USA Two BV, ABP submitted extensive evidence that all corporate formalities were followed with respect to these entities, they were adequately capitalized (with for instance thirty million dollars in capital being contributed initially to USA One BV and USA Two BV) and maintained their own books and records and bank accounts. Petitioners did not and cannot controvert such evidence. They have argued that the fact that USA One BV and USA Two BV did not have a Board of Directors (Petition for a Writ of Certiorari at 8), must mean that they are sham subsidiaries. In doing so, they failed to recognize or acknowledge that these corporations are organized under the laws of the Netherlands, and Dutch corporations do not have boards of directors. Instead, they have managing directors, and both USA One BV and USA Two BV had the appropriate number of managing directors.

Similarly, there is no evidence in the record of any actions ABP took with respect to the management of the Building. Once again, as an illustration, it is a flat misstatement for petitioners to assert that, after USA One Associates acquired an interest in the Building, ABP engaged Rodin Investment Administration Company ("Rodin") to manage this investment. The record is clear, and the district court expressly found, that USA One Associates, not ABP, engaged Rodin (Pet. App. 122a).

Indeed, the record demonstrates that neither the actual owner of the Building (E/R Associates), its partners (USA One Associates, The Equitable Life Assurance Society of the United States and Pan American Office Investments, Inc.) or the managers of the Building intentionally or negligently violated any fire code provisions or knew or should have known of any defects in the fire detection, alarm and suppression equipment or other life safety equipment. They engaged licensed and qualified independent contractors to install, repair and inspect all necessary equipment, and, in fact, on the night of the fire, the Building exceeded code requirements. The isolated failures of the fire detection, alarm and suppression equipment were the result of the negligence of the independent contractors.

V.

BECAUSE THE DISTRICT COURT'S FINDINGS WERE NOT CLEARLY ERRONEOUS, THE THIRD CIRCUIT WAS CORRECT TO LIMIT ITS REVIEW TO THOSE FACTS DEVELOPED BELOW.

Finally, petitioners insist that the Third Circuit committed "grave error" by not considering certain evidence of ABP's alleged commercial actions in the United States (Pet. App. 26a). This argument is refuted by well-established case law stating that the circuit court is limited in its review to those facts developed in the district court. *See, e.g., Clark v. K-Mart Corp.*, 979 F.2d 965, 967 (3d Cir. 1992) (en banc); *In re Capital Cities*, 913 F.2d 89, 96 (3d Cir. 1990); *Bass v. Attardi*, 868 F.2d 45, 51 (3d Cir. 1989) (per curiam).

Thus, it is not the duty of an appellate court to make evidentiary determinations, and the Third Circuit, in its opinion, correctly stated that this case presents no reason to create an exception to the rule that the "only proper function of a court of

appeals is to review the decision below on the basis of the record that was before the district court. [citation omitted]" (Pet. App. 31a).

Petitioners were given ample opportunity to conduct discovery and submit whatever evidentiary materials they believed were appropriate in responding to ABP's Motion to Dismiss. If they did not provide materials to the district court, that is their own fault for which they must bear responsibility.

Petitioners also take issue with the district court's reliance on its findings of fact in the *Federal Insurance* action. However, the court had all of the arguments, testimony and documents submitted by petitioners as well as the plaintiffs in the *Federal Insurance* action before it when it made its findings of fact.

There was ample support in the record for these findings. Accordingly, the Third Circuit properly concluded that they were not clearly erroneous and based its decision upon the facts as determined by the district court. Even if this Court were to grant certiorari, which it should not, it could properly do nothing different.

CONCLUSION

The Third Circuit Court of Appeals was correct in ruling that ABP is immune from suit under the FSIA. The Third Circuit's interpretation of the third clause of the commercial activity exception is consistent with the plain language of the statute and with Supreme Court precedent. Furthermore, the decision is not in conflict with other courts of appeals, but instead is supported by other authority. The Third Circuit also correctly adhered to the legal principles regarding the separate juridical status of ABP. Finally, the Third Circuit was correct in limiting its review of the record to those facts developed by the district court. For these reasons and those set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN A. COZEN
Counsel of Record
ROBERT W. HAYES
E. J. BORRACK
COZEN AND O'CONNOR
The Atrium, Third Floor
1900 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-2000

KATHLEEN M. COMFREY
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

Attorneys for Respondent